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ABSTRACT

The booklet prepared by the State-Federal Information Clearinghouse of the Council for Exceptional Children uses data from pending and completed court cases to explain how to employ litigation to achieve positive change for the handicapped. Situations in which litigation is thought to have been appropriate and useful are instanced. The following 16 preliminary considerations for persons wishing to instigate litigation are discussed: causes of legal action, legally protected interests or rights, legal approaches for bringing a lawsuit, authority to bring suit, participation by individuals who have not been personally injured, kinds of relief granted by court decisions, determining who to sue, private actions, class actions, completing the litigation process, and choosing a lawyer. Explained are the different court systems (federal courts, state courts, district courts, appeals courts, and supreme courts) and the abstention doctrine which enables federal court judges to refuse to hear cases which are thought to be the responsibility of state courts. Preparation for the trial is discussed in terms of complaints, pleadings, answers, defenses, replies, amendments, motions, discovery, expert witnesses, and the roles that experts may serve in the litigation process. Also explained are trial by jury, the actual steps of a trial, conditions creating the necessity for an appeal, the nature of the appeal, legal precedent, and determinants of the merit of court decisions. Litigation expenses and difficulties in implementing court decisions are noted. (GW)

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State-Federal Information Clearinghouse For Exceptional Children

The Council for Exceptional Children

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LEGAL CHANGE
FOR THE HANDICAPPED
THROUGH LITIGATION

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PREFACE

During the past few years, the nation's courts have literally been flooded with lawsuits relating to government's responsibilities to handicapped children and adults. Specifically, these suits have focused on the right of handicapped children to obtain an appropriate publicly supported education, the right to treatment including education for institutionalized handicapped children and adults, and the use of improper classification and placement practices to restrict children's opportunities to obtain an appropriate education.

The use of litigation as an avenue to achieve positive change for the handicapped stimulated a need for information about the legal issues and processes that formed the basis of the movement. To answer the latter need, this book was developed as a semi-technical manual to familiarize observers and participants in litigation with this avenue for achieving legal change for the handicapped.

Specifically, the book is directed to persons unfamiliar with the litigation process who are studying it or who may themselves be considering initiating a lawsuit or defending against one. In addition it is hoped that the book will assist administrators of programs for the handicapped to clarify individual program weaknesses subject to legal question for the purpose of altering practices. In no way is this document intended to substitute for trained legal counsel. Rather, it should emphasize the highly complex nature of procedures and strategies that must enter into the framing of or defending against a lawsuit.

The book was developed by the State-Federal Information Clearinghouse for Exceptional Children (SFICEC) of The Council for Exceptional Children with assistance from the Mental Health Law Project. SFICEC, which is supported by the Bureau of Education for the Handicapped of the U.S. Office of Education, has as its purpose to identify, acquire, process, selectively retrieve, and disseminate information pertaining to government and the education of handicapped children. In carrying out this charge, SFICEC has developed a computer-based information system for the efficient and accurate retrieval of information.

To disseminate this information, SFICEC develops and distributes information products with material drawn from its data base. The products focus on specific areas pertaining to government and the education of handicapped children and utilize information from the law, administrative regulations, attorney generals' opinions, and litigation. Other products discuss key issues and areas of concern to educators, parents, and public policy makers. One particular charge of the project was to develop materials that closely examine the four major avenues of legal change—law, administrative literature, attorney generals' opinions, and case law—from the perspective of the technical processes of proceeding down these avenues, the force of the avenues, and finally, the current status of each avenue regarding the education of handicapped children. This book represents the first avenue study and focuses on the litigation process. A companion document, A Continuing

Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children, available from SFICEC, contains summaries of current litigation regarding the right to education, right to treatment, and classification and placement.

In reading this document there are two points that must be made explicit. Changes sought through litigation may be very similar to directions the party named as "defendant" has tried to produce but whose ability to achieve these objectives has been frustrated because of barriers such as inadequate agency commitment or financial support. In this sense, litigation (or the threat of litigation) may be used as a lever to bring about the action desired by both the potential defendant and plaintiff. In this regard, litigation (or the threat of litigation) may be used by potential defendants to motivate their respective agencies and policy makers to initiate the desired change.

The second major point is that litigation is not necessarily a personal attack upon parties named as defendants. Frequently complaining parties are aware that the party named as defendant has tried to produce desired change. It is also known that in some of the cases referred to in this document, named defendants have spent days preparing defenses for the suit and nights assisting the plaintiffs prepare their arguments. It is in the best interests of the handicapped to prevent litigation or the threat of litigation from becoming personal, because regardless of the decision, it is likely that the named defendants will retain a major role in implementing the desired change.

In describing the litigation process and explaining legal terminology, this book attempts to be as thorough as possible without burdening the reader with undue detail. There are many complex areas of the law which have only been touched upon lightly. Again, the purpose is not to make the reader a qualified attorney but to provide a solid overview which will enable non-lawyers to have a meaningful understanding of legal intervention.

The status of cases referred to in this document are subject to revision and change as the cases progress through the court system. Therefore, if, sometime in the future, readers are interested in using the facts and/or outcome of a particular case as examples in other situations, attempts should be made to determine case outcomes and obtain information about new cases.

Special recognition must be given to Elaine Trudeau and J. B. Fleury of the State-Federal Information Clearinghouse for Exceptional Children who perservered through a number of revisions of this material and continuously made suggestions for its improvement. Although too numerous to mention, acknowledgement must also be given to the attorneys who assisted in the development of this book.

Alan Abeson
May 1973

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THE FIRST QUESTIONS

WHEN IS LITIGATION APPROPRIATE?

Litigation, only one avenue of legal change that can be used to obtain change, becomes appropriate when the "constitutional or statutory rights" of exceptional children are abridged and when administrative remedies for redress have proven either ineffective or inefficient in protecting those rights.

Because litigation is both costly and lengthy, it is usually in the best interest of all parties to first attempt other avenues for producing change such as enacting legislation, changing administrative practices, and/or exhausting all administrative remedies. It is not infrequent that a court will require that all administrative avenues be exhausted before legal intervention can begin.

Secondly, even when a suit is brought, it is not uncommon that many of the important issues are resolved outside of court, negotiated between the administrative agency and the complaining party. Often, to achieve a solution prior to litigation, attorneys will enter into negotiations with the responsible administrative agency to use its authority to remedy the existing situation. If the negotiations are unsuccessful, then a lawsuit to compel enforcement could follow.

If it is felt that a handicapped child's or adult's rights are being violated, and everything possible has been tried to eliminate the violations, it may then be appropriate to consider litigation as an avenue for producing change.

WHEN IS LITIGATION USEFUL?

There are several situations in which litigation might be useful.

—Many children identified generally or specifically as handicapped, including the mentally retarded, emotionally disturbed, physically handicapped, learning disabled, multiply handicapped, visually handicapped, speech and hearing handicapped, or any other disability category are in many jurisdictions unlawfully prevented from receiving an appropriate public education.

—Many children, often from low socio-economic or minority cultures are, in violation of the due process provisions of the U.S. Constitution, classified as handicapped for the purpose of assigning them inappropriately to special education programs.

—Many mentally retarded persons involuntarily committed to institutions are either denied any program or provided with inadequate treatment programs and are often subjected to conditions which may endanger their psychological and physical well-being.

An example of successful litigation to produce change concerning the rights of handicapped children is the case of *Mills* v. *Board of Education, No. 1939-71 (District of Columbia)*. A class action suit was filed in 1971 in the District of Columbia to compel the school board to provide appropriate education for retarded, physically handicapped, emotionally disturbed, hyperactive, and all other handicapped children.

The plaintiffs charged that the city provided insufficient funds for children needing special education. A relatively small number of exceptional children were provided with tuition grants enabling them to obtain private instruction, others were placed in public school classes and hundreds of children were forced to remain at home receiving no formal education. The suit sought to establish the constitutional right of all children to an education commensurate with their ability to learn. It was charged that although these children could profit from an education, either in regular classrooms with supportive services or in special classes adapted to their needs, they were denied admission to the public schools or excluded after admission, with no provision for alternative educational opportunities or periodic review. Secondly, these children were excluded, suspended, reassigned, expelled, and transferred from regular public school classes without affording them procedural safeguards and due process of law.

In August, 1972, Federal Judge Joseph Waddy declared that exceptional children have a constitutional right to a public education, and ordered the District of Columbia to offer all children in the plaintiff class appropriate education placement within 30 days of the decision. The judge also directed the District school system to create an elaborate hearing procedure under which no pupil could be suspended from school for disciplinary reasons for more than two days or placed in, denied, or transfered to and from a special education class without a public hearing. This ruling has had national impact as the first court decision explicitly stating that handicapped children have a constitutional right to a public education.

The lack of funding is frequently cited by public officials as the primary reason for the absence of adequate education programs for exceptional children. In their *Mills* defense, the District School System and the school board stated that it was impossible to provide special education for the handicapped unless Congress appropriated millions of dollars for that purpose. The judge responded by saying, "The inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the exceptional or handicapped child than on the normal child."

Another example of successful litigation concerned the rights of institutaionalized handicapped adults and children is the case of *Wyatt* v. *Aderholt, 334 F Supp. 1341 (M.D. Alabama, 1971), 32FF. Supp. 781 (M.D. Alabama, 1971)**. (This case has been appealed), where concrete judicially enforceable standards were developed through litigation for the adequate treatment of the mentally ill and mentally retarded in two of Alabama's State institutions. It was alleged that the two state mental hospitals and a home for the mentally retarded involved in the case were grossly understaffed and that the programs of treatment and habilitation afforded the residents were extremely inadequate. In March 1971, a federal district court judge ruled that involuntarily committed residents in one of the mental hospitals have a

*Known as *Wyatt* v. *Stickney* prior to appeal. Stickney was the Alabama commissioner of mental health when the suit was filed. Aderholt is the superintendent.

constitutional right to adequate treatment and that the treatment provided in the hospital was inadequate. Since that time, a number of expert witnesses were assembled by amici (friends of the court) and formulated detailed standards of adequate treatment and habilitation for the mentally ill and mentally retarded. After a series of conferences, the defendants in the case agreed to accept and implement many of these standards. To immediately bring the institution for the mentally retarded to a condition which would at least protect the physical safety of the residents, the court ordered that changes be implemented to make the buildings fire-safe, to control the distribution of drugs, and for the state to hire 300 new employees within 30 days.

This is the first case in which a court has held that the institutionalized mentally retarded have a constitutional right to adequate treatment and the first case to objectively set measurable and judicially enforceable standards for adequate treatment. The "minimum constitutional and medical" standards set in this case included the establishment of individual treatment plans, minimum educational standards including teacher-student ratios and length of school days, a provision against institutional peonage (residents working for the hospital without any pay), a number of protections to ensure a humane psychological environment, minimum staffing standards, detailed physical standards, minimum nutritional requirements, and a requirement that every mentally retarded person has a right to the least restrictive setting necessary for habilitation.

Of course, not all litigation attempts are successful. Even with the most conscientious of attorneys, and what seems the most "noble" of causes cases are lost. Aside from legal considerations, factors such as the judge's familiarity and disposition toward an issue, the degree of public support for the issue, and the social and political timing for bringing the suit may all have bearing on the outcome of the case. In short, litigation can be a most useful vehicle for bringing about change, but there are no guarantees that at the end of the road, the desired destination will have been achieved. Even when a case is won, it may only signal the beginning of much more work to translate the victory decree into improved programs.

In other circumstances, the negative formal outcome of a law suit may produce a positive result. While a judge may rule against the plaintiff on the legal issues, the lawsuit may be the catalyst for the initiation of fruitful negotiations and may have served to crystalize the issues in a way that attracts the interest of the public and more important, public policy and law makers.

PRELIMINARY CONSIDERATIONS

WHAT ARE SOME OF THE PRELIMINARY CONSIDERATIONS FOR PARTIES WHO MAY BECOME INVOLVED IN LITIGATION?

There are many important decisions which must be made by potential parties to a lawsuit. These decisions range from meeting basic prerequisites for actually entering court to selecting strategy. Among the basic prerequisites is that the parties seeking to bringing a lawsuit must have been injured or wronged. This means the plaintiffs must have an issue or cause of action based on a violation of some legally protected interest. The plaintiffs themselves must be ones who have actually been injured or have direct relationships to persons being injured, so that they have standing to sue. Under some conditions being a taxpayer is sufficient to establish standing for the purpose of a lawsuit. In *Rainey* v. *Watkins – Chancery Court of Shelby County, Tennessee (March, 1973)* two of the plaintiffs in this right to education case are described as taxpayers who must bear the tax burden resulting from welfare assistance to and institutional care of all handicapped persons who do not receive an education.

The plaintiffs must initially determine what type of relief or remedy they want the court to grant. This decision will also affect who will be named by the plaintiffs as defendants in the lawsuit.

Depending on the type of injury which the plaintiffs have suffered and the number of people who have suffered the injury, a decision must be made whether to bring an individual action or a class action lawsuit.

Extensive consideration must occur by the plaintiffs in selecting an attorney. The defendants, if government, will be represented by attorneys employed by the state or respective local agencies. Another key step for both sides is the collection of all the facts relevant to the case and for the plaintiffs alone to establish the facts of the alleged violation.

All of the points above are discussed more fully below.

WHAT IS A CAUSE OF ACTION?

A lawsuit is made up of one or more issues or causes of action. For example, in *Mills* v. *District of Columbia,* one cause of action was the denial of an appropriate publicly-supported education to school age handicapped children. A cause of action can be acted upon by the Courts because it involves a legally protected right.

WHAT IS A LEGALLY PROTECTED INTEREST OR RIGHT?

Citizens and residents of the United States are guaranteed certain rights under the United States Constitution, state constitutions, and federal and state statutes. In seeking to vindicate the rights of the emotionally disturbed, mentally retarded or other handicapped persons certain provisions of the United States Constitution and many state constitutions are relied upon, such as, the right to equal protection of the law.

The Fourteenth Amendment of the United States Constitution provides: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." This has been interpreted to mean that it is unlawful to discriminate against a class of persons for an arbitrary or unjustifiable reason.

This is a particularly important right for exceptional children seeking appropriate education opportunities. In *Brown* v. *Board of Education 347 U.S. 483 74S.Ct. 686, 98 L. Ed. 873 (1954)*, the famous desegregation case, the court said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In the *Mills* case described earlier, this reasoning was applied directly to "exceptional children." It must be added however, that the Supreme Court ruling in the *San Antonio Independent School District* v. *Rodriguez, Docket No. 71-13-32 (410 U.S.)* in March, 1973, indicated that the judiciary is beginning to reflect caution in the extension of equal protection principle in educational questions.

The right to due process of law as provided by the Fourteenth Amendment of the United States Constitution also declares that "no state may deprive any person of life, liberty, or property, without due process of law." This right encompasses both substantive and procedural due process although the cases regarding the handicapped have involved primarily the latter area. From a procedural viewpoint due process refers to the right to have laws applied with adequate safeguards so that a person will not be subject to arbitrary and unreasonable actions. In *PARC* v. *Commonwealth of Pennsylvania, C.A. No. 71-41 (3 Judge, E.D. Pa.)*, a case similar to *Mills* regarding the right to an education for the mentally retarded and as in *Mills* the courts ordered extensive due process procedures that provide in part that before a child can be expelled, transferred, or excluded from a public education program, that child or his parents or guardian has a right to a fair hearing, a right to receive notice about the hearing, and a right to have counsel present at the hearing.

Forty-nine states presently have compulsory school attendance laws which define both the children who must attend school and the children who may be excluded from school. Although the statutory language differs from state to state, in general, state laws allow for the exclusion of children from public education who do not meet intellectual, social, behaviorial or physical requirements for existing education programs.

As a result of these exclusion clauses, a substantial number of handicapped children have been denied an education. Proponents of right to education are seeking to prove such statutes illegal. For example, in *Lori Case* v. *State of California, C.A. No. 1016 (Calif. Superior Court, Riverside)* involving the termination of the school placement of a child diagnosed as autistic, deaf and possibly mentally retarded, from a multi-handicapped unit

of the California School for the Deaf at Riverside, California, the plaintiff's attorney argued:

> *Meyer* v. *Nebraska* makes clear that the Fourteenth Amendment obligates the states to guarantee to their citizens the right to learn - to 'acquire useful knowledge,' since such a right necessarily requires training in the minimal skills required to acquire knowledge, it follows that due process also requires the states to discharge the obligation of providing a minimum education to its citizens.

The *Pennsylvania* case and the *Mills* case illustrate the Court's recognition that exceptional children have a right to a publicly spported education, and to adequate procedures to ensure that proper consideration is given before any child is suspended or excluded from a public education program.

Related is the right to appropriate classification, or stated in another way is the right to be protected from inappropriate labels such as "mentally retarded", "emotionally disturbed", "behavior problem", or any other term denoting education difference calling for "special" treatment.

Evidence* is increasingly being collected indicating that a number of children placed in special education classes, or suspended, expelled or transferred from regular public school classes are from minority and non-English speaking cultural backgrounds. Critics charge that many of these children have been classified on the basis of culturally biased tests that do not accurately indicate their learning ability.

For example in *Diana* v. *State Board of Education (C-70 37RFR)* in California, nine Mexican-American public school students from age eight through 13, alleged that they had been inappropriately placed in classes for the mentally retarded on the basis of biased standardized intelligence tests. The plaintiffs came from home environments in which Spanish was the only or predominant language spoken. When the case was decided in 1970, the defendant school districts agreed to several procedures to ensure better placement, including testing in the children's primary language, the use of nonverbal tests and the collection and use of extensive supporting data. This issue is also continually being raised for judicial resolve.

The right to treatment, the right of civilly committed persons to receive adequate and effective, individualized care when placed in an institution for the mentally ill or retarded is also beginning to be addressed by the courts. A case decided in the District of Columbia in 1966, *Rouse* vs. *Cameron, (373F, 2d 451, 1966)* was the first in which a court recognized that persons involuntarily hospitalized might have a constitutional right to treatment although the decision was actually based on a statutory right, guaranteed under the laws of the District of Columbia.

Wyatt v. *Aderholt**, discussed earlier, was the first case in which a court held that institutionalized mentally ill and mentally retarded persons have a constitutional right to adequate treatment, and the first case to set objectively

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*See Dunn Lloyd. "Special Education for the Mildly Retarded - Is Much of It Justifiable?" *Exceptional Children* (September, 1968) Vol. 35, No. 1.

measurable and judicially enforceable standards for adequate treatment. The right to refuse treatment is now being articulated especially in the area of behavior modification and psychosurgery.

The right to treatment has certain corollaries, some of which may appear to be in conflict. Experts who have testified in the cases to date have indicated that the right to treatment includes the right to be treated in less restrictive, more "normal" community settings. This is because evidence exists that institutionalization itself, even in a relatively good facility, can lead to deterioration and make more difficult the struggle of the committed person to be released and ultimately to cope successfully with the outside world, which is the purpose of commitment and treatment. The right to be treated in the least restrictive setting makes sense from theraputic and fiscal viewpoints and is also consistent with the constitutional principle of "the least drastic means."

The Constitution requires that wherever a government is going to restrict a person's liberty against this will in order to accomplish a legitimate governmental objective, it must impose the least drastic restriction.

In *Wyatt*, the Court said:

> No person shall be admitted to the institution unless a prior determination shall have been made unless that residence in the institution is the least restrictive habilitation setting feasible for that person. No mentally retarded person shall be admitted to the institution if services in the community can afford adequate habilitation to such person.
>
> Residents shall have a right to the least restrictive conditions necessary to achieve the purposes of habilitation. To this end, the institution shall make every attempt to move residents from (1) more to less structured living; (2) larger to smaller facilities; (3) larger to smaller living units; (4) group to individual residence; (5) segregated from the community to integrated into the community living; (6) dependent to independent living.

The status of the constitutionally based right to treatment concept is undergoing review in the 5th Circuit Court of Appeals. The court will act on an appeal filed from Alabama on the *Wyatt* decision and another appeal from plaintiffs in Georgia where a similar action was dismissed by the court in *Burnham* v. *Georgia Department of Public Health, C.A. No. 16385 (U.S. District Court, N.D. Ga.)*

The right to be free from involuntary servitude is established by the Thirteenth Amendment of the U.S. Constitution and, in the context of this book, refers to deprivation of the rights of institutionalized residents who are forced to perform non-therapeutic labor without compensation. It is alleged that workers also have a statutory right under the U.S. Fair Labor Standards Act to payment for work which is necessary to operate the facility. *Dale* v. *New York (N.Y. C. Claims, Claim No. 51888)*, is one of the first cases to attack "institutional peonage" in public mental hospitals. The *Dale* case

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* This case is discussed in detail in *Basic Rights of the Mentally Handicapped*, Mental Health Law Project, 1751 N Street, N.W., Washington, D.C. 20036.

involves a former patient treated for mental illness who was forced to work for 16 years at menial tasks in an institution without compensation. If the case is successful, and the patient is given a favorable decision by the court on the cause of action regaurding involuntary sevitude, it will be the first time that a patient has recovered back wages for involuntary labor performed in an institution for the mentally ill.

Decisions by the United States Supreme Court have established that all constitutional rights are present rights – rights which exist now and which must be promptly vindicated unless there is an overwhelmingly compelling reason to justify delay. For example, in *Mills*, the Court required program delivery for the affected children within 30 days.

WHAT ARE THE BASIC LEGAL APPROACHES FOR A LAWSUIT?

If a person's constitutional rights are violated by anyone acting under color of state law (under the authority of the state), he may bring a case. Although there is no statute creating the permission of a cause of action against federal officials charged with denying a person his constitutional rights, it is well established that federal courts will grant relief for such abuses. Thus, officials of government may be sued for not performing statutory obligations.

In addition to gaining recognition of specific rights for exceptional children and handicapped adults, a party might bring a common law tort action (common law refers to the body of law which has been built through case decisions). A tort is a civil wrong for which a private citizen may recover money damages. To have a tort action, plaintiffs must have been owed a legal duty by the alleged wrongdoer ("tort feasor"), such as a doctor's duty to give relatively good care to his patient, which was breached causing an injury. Some of the injuries for which a person can bring a tort action include: assault and battery, intentional infliction of mental distress, false imprisonment, and invasion of privacy.

WHO CAN BRING A SUIT?

All plaintiffs must have standing and capacity to sue. Standing means that the plaintiff himself must be the one who suffered or is in immediate danger of suffering injury, or that he has a substantial interest. Parents or guardians have standing to sue in the names of their children or wards. For example, the *Lori Case* suit was brought by Lori Case's guardian *ad litem*, "for the litigation" Estelle Case, her mother.

A problem arises when an individual seeks to sue because someone else's rights have been violated. In many states a person cannot assert that the rights of another have been violated or that a statue is unconstitutional if the statute is not unconstitutional as applied to the person actually bringing the suit. An individual may be outraged at conditions at a training school for the mentally retarded, for example, but if he is not the one suffering from the conditions there, he cannot bring suit in his name, but must seek to have the suit brought in the names of the injured children because it is their rights which are violated by the inadequate care and facilities. This rule is based upon a policy decision that a person directly affected by illegal action will be likely

to prosecute his case with more energy and diligence, than would an interested bystander. In some instances, however, an organization can sue on behalf of its members as is being done by several state associations for retarded children.

A plaintiff must also have the capacity to sue or be sued. Capacity is determined according to the laws of the area where a person resides. Infants (minors) or incompetents must have a representative to sue on their behalf. The court is authorized to appoint such a representative (a next friend or guardian *ad litem*) if no suitable family members or friends are available to protect their interests in the litigation.

For example, *Mills* was brought on behalf of Peter Mills and six other named children of school age by their next friends. The next friends included the children's parents or guardians, and in their absence, the District of Columbia Welfare Rights Organization, U.S. Representative Ronald Dellums, a member of the House Committee on the District of Columbia, Reverend Fred Taylor, and the Director of FLOC (For Love of Children, Inc.), an organization seeking to alleviate the plight of homeless and dependant children in the District of Columbia.

ISN'T THERE ANY WAY FOR ONE TO PARTICIPATE IN A CASE IF HE IS NOT PERSONALLY INJURED?

Yes, it is possible to participate as *amicus curiae* or "friend of the court". The courts will often allow a party to present supporting arguments for one side (either plaintiff's or defendant's) of the case. Normally, this involves submitting a brief containing written arguments, but, under extraordinary circumstances, the right to participate in the case orally can be granted. This means that "friends" of both sides can be presented and are subject to cross-examination by the opposite side. Such participation was allowed in *Wyatt* where *amici* for plaintiffs included the United States of America (the Federal Government), the American Psychological Association, the American Orthopsychiatric Association, the American Civil Liberties Union, and the American Association on Mental Deficiency. The National Association for Retarded Children, and the National Association for Mental Health.

Persons not named as plaintiffs can, however, provide significant assistance in the litigation by helping to perform the required extensive research and fact gathering as well as to provide or raise any necessary funds.

WHAT KIND OF RELIEF WILL THE COURT GRANT? *

In suits designed to produce social change, the following types of relief* are often sought.

Declaratory relief is where plaintiffs ask the court to declare or state clearly to defendants that plaintiffs have certain rights. A request for this kind is usually coupled with a request for *injunctive relief* whereby the plaintiffs ask

*The focus of this book is *civil* litigation where private individuals are seeking redress of personal grievances; *criminal* litigation is where the State or the Federal Government seeks to prosecute commission of acts which have been defined as "criminal" by statute

the court either to order defendants to alter their actions or to restrain them from taking some specified action. For example, in *Harrison* v. *Michigan, (E.D. Michigan, 50 Div. C.A. No. 38357)* brought on behalf of all children in Michigan being denied a publicly supported education because they were labelled retarded, emotionally disturbed, or otherwise handicapped, the plaintiffs asked the court to delcare that the defendants' acts and practices denied the plaintiffs' Due Process of Law and Equal Protection under the Fourteenth Amendment of the United States Constitution and to enjoin the defendants from excluding plaintiffs and the class they represented from a regular public school placement without providing (a) adequate and immediate alternatives, including but not limited to, special education, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress, and the adequacy of any educational alternative.

Injunctive relief includes *temporary restraining orders* and *preliminary* and *permanent injunctions* which are court orders requiring or forbidding certain actions. *Temporary* restraining orders and *preliminary* and *final* injunctions differ in that they are issued for varying lengths of times, at various stages of the litigation process, and on the basis of varying degrees of proof.

In *Wyatt*, the court issued a temporary restraining order before the case was finally decided requiring the Alabama state officials to immediately hire 300 employees to care for the institutionalized residents because the court was convinced that the patients' lives were endangered by the existing sub-standard conditions at the institution.

Injunctive relief might also include appointment of a *Master* who is given authority to take over the challenged institution or system and supervise implementation of the court's decision. Two masters were appointed by the court in *PARC* to oversee the implementation of the consent agreement established in this case. The appointing of a master to take over the administration of an institution is unusual.

Stays are orders delaying enforcement of judicial orders until some further step can be taken, such as appealing the decision to the next highest judicial level. In *Wyatt*, after the plaintiffs won in the district court, the defendants attempted to obtain an order staying enforcement of the district court's decision which if implemented would have required massive changes in the state's institutions, until the 5th Circuit Court of Appeals had reviewed the case.

Another kind of suit more infrequently used seeks a *writ of mandamus* requiring public officials to perform their legal responsibilities. *Writs of mandamus* have been sought in some states where local districts ignored statutory requirements to develop plans for the education of handicapped children. Plaintiffs may also seek a *writ of habeas corpus*, which is used to obtain release from unlawful confinement. The institutionalized petitioner in *Rouse* v. *Cameron* sought such a writ. *Habeas corpus* can also be used to protest conditions of confinement as well as to challenge the confinement itself.

Money *damages* may also be sought. For example, in *Lebanks* v. *Spears, (E.D.L.A. - N.O.Div., C.A. No. 71-2897)*, a class action brought on behalf of eight black children and all others similarly situated in the Parish of Orleans, Louisiana who were allegedly labelled "mentally retarded" without valid reason or ascertainable standards and then denied a public education, each plaintiff is seeking $20,000 for the damage suffered.

The various kinds of damages include *nominal damages* awarded to a plaintiff as a token of the injury, *compensatory damages*, awarded to repay the plaintiff for the injury actually incurred such as medical expenses and/or pain and suffering, and *punitive damages* awarded when the injury is committed maliciously or in wanton disregard of the plaintiff's interests.

In requests for relief, *court costs* and *attorneys fees* may also be sought. While court costs are usually granted to the prevailing or winning side as a matter of course, attorneys fees in the past have rarely been recoverable and usually occurred only where a statute provided for their recovery or where the court exercised its discretion to transfer the fees. Recently, however, there has been a trend on the part of courts to award attorneys fees to lawyers representing poor clients on the theory that encouraging such private law enforcement of constitutional rights is for the good of all society and that such lawyers are actually acting as "private attorney generals". Attorneys fees were awarded by the district court in *Wyatt*.

WHAT ARE A PLAINTIFF'S CONSIDERATIONS IN DETERMINING WHO TO SUE?

There may only be one defendant involved in a case or there may be several people responsible for alleged legal injuries. In suing a state or local government, as in *Mills* the plaintiffs name specific persons with administrative responsibilities, and to join or include all the necessary parties having the authority to make desired changes. For example, the defendants in *Mills* included the Board of Education of the District of Columbia and its members, the Superintendent of Schools for the District and subordinate school officials, the Director of Human Resources in the District of Columbia, certain subordinate officials, and the Mayor of the District of Columbia.

The doctrine of *sovereign immunity* is often raised by state or local government units to argue that suit cannot be brought against them. This immunity, however, is often waived by statutes so that suits are possible. However, even if *sovereign immunity* is not waived, it usually does not affect the right to sue individual officials rather than the state itself, on the theory that officials do not have the authority to act or are acting beyond their authority. Most state and federal officials have immunity from tort actions for money damages, for negligent or wrongful acts, for omissions committed within the scope of their employment, or for failure to use due care in enforcing a statute, although such immunity does not extend to actions seeking injunctive relief. Injunctive relief, however, can be obtained if the issue involves violation of a constitutional right.

WHAT IS A PRIVATE ACTION?

A *private action* is a legal action on behalf of one or more individuals or on behalf of an organization. Therefore, whatever the outcome of the case, it will directly affect only the individuals specifically named as plaintiffs in the case, although the indirect effects can be widespread.

WHAT IS A CLASS ACTION?

In a *class action* a named plaintiff(s) brings an action both for himself and on behalf of all persons similarly situated. In the *Mills* case, the suit was undertaken not just on behalf of Peter Mills and other named plaintiffs, but significantly also on behalf of a *class* of plaintiffs—all "exceptional" children who resided in the District of Columbia. In the *Wyatt* case, the named plaintiff represented all residents of the state of Alabama involuntarily confined to the state's hospitals.

Plaintiffs must satisfy many complex procedural requirements in order to maintain a class action in most jurisdictions. The Federal Courts are considered to have one of the most lenient sets of standards for class actions while in contrast, many states have more restrictive rules controlling such actions.

In a federal suit, one or more members of a class may sue as representatives of all the other members of the class if:

1. the class is so large that it would be impractical to make all members plaintiffs;

2. there are questions of law or fact common to the members of the entire class;

3. the claims of the representatives are typical of the claims of the entire class; and

4. the representative parties will fairly and adequately protect the interests of the entire class.

These are not the only qualification but are the basic prerequisites for a federal class action. This is a complicated area in which legal counsel is essential.

WHY MAY CLASS ACTIONS BE MORE DESIRABLE THAN A PRIVATE ACTION IN LITIGATION DIRECTED TO SOCIAL CHANGE?

If the named plaintiff in a class action is dropped from the case, the whole action does not necessarily become "moot" or academic and therefore unsuitable for a hearing before the court. For example, in a private action, if Peter Mills had been admitted to public school classes during the litigation procedure, the case would have become moot because he would no longer have been denied an education and thus would no longer have a cause of action against the District of Columbia. In a class action, if Peter had been placed in a school, the case could have continued since there were other children who would be directly affected by the outcome of the case.

Secondly, if a temporary restraining order is issued prior to a full hearing the order applies to the class rather than just to the named plaintiff.

In a private action, the temporary restraining order would only apply to the individual plaintiff.

Third, any final relief granted by the court is for all members of the class, and is not limited to the named plaintiff. Again, using *Mills* as an example, a public school education is required not only for Peter, but for all children in the class of exceptional children excluded from school in the District of Columbia.

Fourth, any member of the class can initiate contempt proceedings if the order of the court is not implemented with respect to him individually. In *Mills*, if the order is not implemented in respect to any handicapped child, a representative of the child can return to court to have the relief enforced, and possibly, to have authorities fined or jailed for failing to obey the court order.

While class actions are often desirable, it must not be forgotten that the risks are also higher in such actions. If a class action suit is lost, it will be more difficult for others in the class to bring another suit on the same issues involving the same circumstances. Also, if the named plaintiffs are not fully representative, have not suffered all of the injuries of other members of the class, all relevant causes of action may not be brought out in court, and thus, the relief granted may not be sufficient to provide all members of the class with adequate remedies.

ONCE BEGUN, IS IT NECESSARY TO GO ALL THE WAY THROUGH WITH LITIGATION?

It is important to understand that at any point in the process a plaintiff or defendant can reach a settlement in which either side may concede all of the points raised in the case or reach a compromise as to any or all of the issues. Negotiations may be held during the course of the litigation leading to resolving of certain issues or facts and thus removing them from consideration by the court. If an out of court settlement is achieved, the opposing party may agree to stop the action at issue. In a class action, however, the court must approve any settlement.

If settlement is made, the court's enforcement powers will not be behind the agreement, unless a judicially approved *consent agreement* is obtained which means *court ratification* or approval of settlement. In *Pennsylvania Association of Retarded Children* v. *Pennsylvania*, a federal district court ordered that all mentally retarded children in Pennsylvania be given access to a free public program of education appropriate to their learning capabilities, pursuant to a consent agreement between the parties. Obtaining a consent agreement probably saved lengthy litigation, obviated the possibility of an unfavorable decision for the plaintiffs, and enhanced the prospect of the desired action to occur.

The willingness of parties to settle will depend on the objectives sought by the lawsuit. If the lawsuit is a test case to try to establish a certain right, as well as vindicate the rights of plaintiffs, one purpose of the litigation may be to have the court recognize the right, and articulate its reasons, so that the decision will have value as a precedent. If these objectives are sought, settlement may not be possible.

In some situations the threat of a lawsuit alone can accomplish all that is desired by a suit. Approximately two-thirds of all litigation is settled out of court. Settlement is less expensive and time consuming than litigation and may lead to a more satisfactory conclusion than would result from a court decision. Out of court negotiated settlements may be sought at any stage in litigation proceedings, even when the case has reached the appellate level.

WHAT FACTORS SHOULD BE TAKEN INTO ACCOUNT IN CHOOSING AN ATTORNEY?

There are many considerations which should be weighed in the selection of an attorney. Perhaps the most significant is that he has a positive reputation as being competent. Equally important is that his past includes trial experience that reflects commitment to the position taken by the parties he represents. This does not require commitment to the issues in question, but commitment to do the best possible for his clients. The attorney selected must also be one in whom the client has confidence. Regardless of the position taken or the issue in question the attorney and client will spend much time together which can be enhanced if the relationship is built on confidence. Because litigation on behalf of handicapped persons is a fairly new area of the law, the attorney must be willing to draw on already established programs for information and technical assistance. A listing of nine of these groups is presented at the conclusion of the book.

SELECTING THE APPROPRIATE COURT

WHAT ARE THE NEXT STEPS?

Initially in the litigation process, the plaintiffs' attorney must select the appropriate court to hear the case. There are two court systems in the U.S., the *federal courts* and the various *state courts*. (See Chart I.)

While in some areas of law, courts in both the state and federal systems may have the authority under the United States or state constitutions to hear a case, state courts generally become involved with issues of state law or practices, and federal courts hear cases involving parties who live in two or more states; and also cases where a question involving the U.S. Constitution or other federal law is raised.

WHAT IS THE FEDERAL COURT SYSTEM?

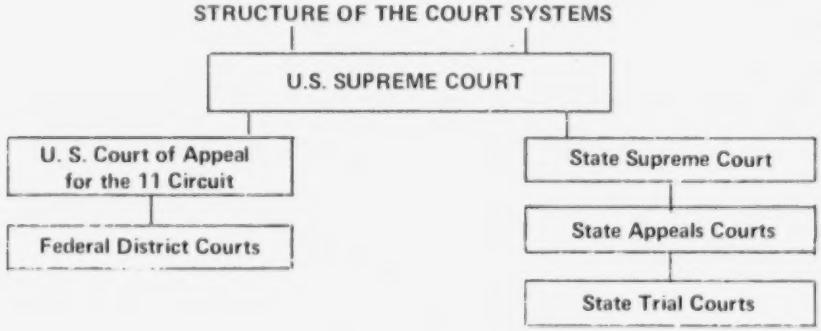
The federal court system consists primarily of 93 *Federal* District Courts, 11 *U.S. Circuit Courts of Appeal* and the *Supreme Court of the United States.*

WHAT ARE THE DISTRICT COURTS?

The 93 Federal District Courts are the *trial-level* courts in the federal system where suits are actually heard. Each state has at least one District Court. The number of judges in each court varies, depending on the size of the District and the number of cases it hears, but most district courts have two or more judges. The Southern District of New York, which covers an area of especially high intensity, has 24 judges. Usually a single judge will try a case and hand down a decision. However, in some cases a *three-judge* court is required, consisting of district court judges and appeals court judges. For example, a three-judge court might be necessary when plaintiffs seek to *enjoin* (stop) a state from taking some action which allegedly violates their interests. It is used primarily to seek an injunction on the basis of unconstitutionality of state laws.

CHART I

STRUCTURE OF THE COURT SYSTEMS


U.S. SUPREME COURT
U. S. Court of Appeal for the 11 Circuit
Federal District Courts
State Supreme Court
State Appeals Courts
State Trial Courts

There are other federal courts, not relevant to this publication, such as the Tax Court, the Military Court of Appeals, and the Court of Claims.

WHAT IS THE RESPONSIBILITY OF THE U.S. COURTS OF APPEAL?

The U.S. Courts of Appeal review decisions of the federal district courts. There are eleven Courts of Appeal, one for the District of Columbia and one for each of the ten other circuits in the United States. Each circuit includes from three to ten states and the territories. Each Appeals Court has from three to fifteen judges. Three judges are usually assigned to each case.

The Courts of Appeal have jurisdiction to review decisions of the District Courts, as well as to review orders of many administrative agencies and, in some cases, to issue original decisions. The appeals process is explained later.

WHAT IS THE U.S. SUPREME COURT?

The Supreme Court is the highest court in the country and consists of a Chief Justice and eight Associate Justices. The Justices are appointed by the President with the approval of the Senate, as are all federal judges. The court has the power to review all matters of law relating to the U.S. Constitution and has the final appellate power on all other matters of law.

WHAT IS A STATE COURT SYSTEM?

Each state court system is established under the constitution and statutes of individual states. Consequently, each state system may have a different number of courts and each court may have different kinds or limitations of power upon the cases it can hear. Most states, however, have the same general court structures, even though the courts may have different names.

Initially, there are usually several trial-level courts which may be referred to as superior courts or courts of general jurisdiction. Each has certain areas of responsibility designated by state law in which it has the authority to hear cases and render decisions.

The larger states have two levels of appeals courts, usually referred to as the State Court of Appeals and the State Supreme Court. Many smaller states have only one appeals level court, usually called the Supreme Court. State courts as well as federal courts can construe and apply federal constitutional rights.

The *Lori Case* action, involving the alleged denial of education to a multiply handicapped child, was brought in the Superior Court of Riverside County, California. (Because the case involves federal constitutional rights questions, it could also have been brought in a federal district court.) If the case is lost, the losing side may appeal the decision to the California Court of Appeals, then to the California Supreme Court. The last recourse for the losing side is review by the U.S. Supreme Court.

HOW DO PARTIES DECIDE WHICH SYSTEM TO USE?

The U.S. Constitution and statutes delegate judicial authority between the federal and state governments. In some instances they have concurrent power and plaintiffs have a choice of instituting a particular case in either a Federal or state court. The court(s) must also have the *subject matter* jurisdiction or the authority to hear the case. Whether a court can decide a particular kind of case depends on its constitutional or statutory grant of power.

In order to use federal courts, there must be a statutory basis establishing jurisdiction. The plaintiffs cause of action must involve a *federal question,* a question arising under the U.S. Constitution or federal laws or involve diversity, which means involving parties who are citizens of different states. Generally, to keep the federal courts from becoming clogged, only cases where the cost to the loser in the controversy will be $10,000 or more will be considered. However, for violations of constitutional rights, the rights can usually be valued at the amount necessary for jurisdictional purposes. If these requirements cannot be met, the case must be brought in state court. If a case is brought in a state court and the defendants would rather defend in a federal court (and it is a case where the federal court has jurisdiction) they can ask to have the case *removed* to a federal court.

The decision as to the appropriate court to hear a particular case must be made by the attorneys.

WHAT IS THE ABSTENTION DOCTRINE?

Federal court judges may at their discretion decline to hear certain cases because they believe the cases involve questions for which state courts should be responsible. The usual reason for a judge to refuse to hear a case is because he believes the case involves questions of state law or state policies and that it is more proper for the state judges to make the first decision. For example, a federal judge might decline to hear a case where although a plaintiff contends a state action is in conflict with a constitutional right, the judge feels that the issue can and should be decided on the basis of state law.

A federal judge might refuse to hear a case because he believes that allowing the case to be brought in federal court would involve needless conflict with a state's administration of its own affairs. A third instance where a federal judge might refuse to hear the case is where a private citizen is seeking answers to difficult questions of state law. Finally a federal judge might decline to hear a case, very simply, because it would serve the convenience of the court to have the case decided elsewhere in state court. For example, in *Reid* v. *Board of Education of the City of New York, C.A. No. 71-1380 (U.S. District Court, S.D.N.Y.)* a class action brought on behalf of New York City parents who alleged that their brain-injured children were not receiving special education in the public school system, the plaintiffs sought a declaratory judgment and preliminary and permanent injunctions to prevent a deprivation under color of state law of their rights protected by the Fourteenth Amendment. In June, 1971, the Judge for the U.S. District Court

for the Southern District of New York granted the defendants' motion to dismiss. The court applied the *abstention doctrine*, reasoning that since there was no charge of deliberate discrimination, and since the City was as concerned as the defendants about the situation, this was a case where the state court could provide an adequate remedy and where resort to the federal courts was unnecessary.

ARE THERE ANY OTHER CONSIDERATIONS IN CHOOSING BETWEEN THE TWO SYSTEMS?

If the educative effect of the litigation is important, the plaintiffs may wish to select a court with the greater promise of visibility. Selection of the location should also consider if there are any local feelings that would more likely work to the advantage or disadvantage of one side or the other. Another factor to be considered is the previous decisions of the respective judges in both the federal and the state courts at both the trial and appeal levels. Practices of the respective courts on freedom of discovery and the awarding of attorneys fees may be another indicator to be considered. The length of time required to try cases or come to trial in the alternative courts, may be another factor to consider.

PREPARATION FOR THE TRIAL

ONCE THE APPROPRIATE COURT IS CHOSEN, WHAT ARE THE STEPS LEADING TO THE ACTUAL TRIAL?

Assuming that this is a civil suit in a federal court (state procedures are generally similar), there are several preparatory steps explained earlier and indicated in Chart II, involving the following procedures and documentation which must be considered prior to the formal initiation of the suit.

CHART II

STEPS OF LITIGATION

Preliminary Considerations

Settlement? Negotiation?

Cause of Action?

Legally protected interests of rights?

What kind of relief?

Appropriate Defendants?

Private or a class action?

Select Attorney?

Build Fact Record?

WHAT IS A COMPLAINT AND WHAT ARE PLEADINGS?

A *complaint* is a document in which potential plaintiffs inform the court and the defendants that they have a lawsuit for which they are seeking the court's intervention. The *pleadings* set forth their issue or causes of action and the relief being requested. A suit may be brought under several different and even conflicting theories, hoping to find one or more which the court will recognize and upon which it will grant relief. The term *pleading* is also used more generally to encompass all of the preliminary steps of complaint-answer-replies that are used to narrow a case down to the basic issues of law and fact.

WHAT IS AN ANSWER AND WHAT ARE DEFENSES?

An *answer* is the defendant's response to the compiaint. The defendant will raise *defenses* stating why the complaint is without merit or why he is not guilty of or responsible for the charges claimed. *Procedural defenses*

include basic inadequacies in following the rules of the court including lack of subject matter jurisdiction of the person, improper venue, insufficiency of process, insufficiency of services of process, failure to state a claim upon which relief can be granted, failure to join a necessary part (someone who is also responsible for the alleged violation). Defendants can attempt to have a case "thrown out of court" (dismissed) for any of these reasons.

Affirmative defenses are also reasons why the defendant should not be held responsible and may include such defenses as privilege, consent, sovereign immunity, self-defense of others, assumption of risk, contributory negligence, duress, and illegality.

WHAT ARE REPLIES, AMENDMENTS AND MOTIONS, ETC.?

These are further steps that can be taken in refining the pleadings and responding to allegations or defenses raised by both sides. For the purposes of this publication, it is probably sufficient to understand that parties are not restricted to their *first pleadings* and may make changes up until the time the trial begins, and even, after the trial begins, depending on how the case develops, how the defendants respond, and what the plaintiffs are seeking from the court.

WHAT IS DISCOVERY?

Discovery is the process by which parties learn about the other side's case including available evidence and the identity of witnesses that are going to be called. In a civil case, parties can "discover" the majority of information relevant to the subject matter of their case (discovery is more limited in a criminal case and limited by rules of criminal procedure), except for *privileged* material, such as that relating to a doctor-patient relationship. The purpose of discovery in civil actions is to remove the element of surprise and allow both sides to adequately prepare themselves for trial.

There are several different devices which can be used as part of discovery:

1. *Deposition*—This is a means of obtaining information from anyone who might have knowledge relevant to the preparation of the case. A deposition consists of asking a potential witness to answer oral or written questions under oath in the presence of a court reporter. Attorneys for both sides can be present and can cross-examine the witness or raise objections to the questions or testimony.

2. *Interrogatory*—This is a means of obtaining written answers to questions from any of the *parties* (any plaintiffs or defendants). The questions are sent to the party to be answered under oath and returned within a specified time. The attorney can assist the party with answers, but because no representatives of the opposing side are present there can be no cross-examination.

3. *Production of documents or material objects*—Either party may request and obtain documents and physical objects relevant to the case which are within the control of the other side. For example, if one side wants to

obtain a copy of a psychological evaluation completed on a child and used to deny admittance to a program he can request the opposite side to produce the document. In addition, *The Freedom of Information Act* requires federal officials to make available, with certain narrow exceptions, public documents and reports upon request by citizens.

4. *Physical and mental examinations*—With a showing of *good cause*, a person under custody or under the legal control of the court may be requested to undergo physical and mental examinations. The examining professional may then testify about the results. The examinations must be related to the matter in controversy. For example, a defendant might be seeking to prove that a child cannot benefit from an education and as part of the proof will want to have an assessment of the child's intellectual ability.

5. *Request for admissions*—This is a request that opposing parties admit the truth of certain statements or opinions of fact or of the application of law to the facts so that time will not have to be spent at the trial proving these particular facts. For example, the defendants in the *Wyatt* case stipulated to a number of objective facts concerning the status of Alabama's mental institutions.

There are many considerations in determining which discovery devices to use. For example, depositions are more expensive than interrogatories because the party requesting them has to pay for the time of all the attorneys, the witness, and the court reporter, but they may be of more value because there is opportunity to freely question witnesses which is not possible with interrogatories.

WHAT IS AN EXPERT WITNESS?

An *expert witness* is a person with recognized competence in the area in which he is testifying. At trial the expert will be asked to state his background before providing substantive testimony. The judge and opposing attorney will question him as to his competence and the latter may try to discredit his testimony, either directly or indirectly. Both sides may call expert witnesses. When expert witnesses are brought together in a case, they may have a wide range of background, both in the nature of their formal training, and in their type of applied experience. For example, in the *Mills* case, the experts included:

—a person with a doctorate in the field of special education, who had authored numerous professional publications pertaining to the education of exceptional children, was a consultant to such organizations as the President's Committee on Mental Retardation and the 1965 White House Conference on Education, and had worked for 20 years in the training of teachers and professional leaders in the field of special education.

—an economist with a doctorate in political economy who was the author of several professional publications and a book on the cost benefit analysis of investments in human beings, particularly with regard to the mentally retarded.

—a person with a doctorate in mathematical chemistry who while not involved in direct services to the retarded, had devoted more than 20 years to

civic action related to their cause, was a member of national and state commissions and councils whose purpose was to revise and implement legislation concerning the education and other human rights of retarded children and adults, and who was an author of numerous professional publications including articles on mental retardation.

WHAT OTHER ROLES MAY EXPERTS SERVE IN THE LITIGATION PROCESS?

Experts are vital at two stages of litigation. With regard to actions involving the handicapped, educators, psychologists, psychiatrists, social workers, vocational rehabilitation specialists, and others representative of allied fields may initially be needed to review programs and tour the facilities which are the subject of the suit. During these reviews the experts should interview staff and observe conditions from the perspective of their particular specialties and then must be prepared to present their observations and conclusions to plaintiffs, and defendants, their lawyers, and ultimately to the court. For example, expert testimony in the *Wyatt* case was a necessary prelude to the court's finding that conditions in Alabama's institutions were inadequate by any known scientific and medical minimum standards.

Once the court has found that plaintiff's rights are being violated, experts again have a vital role to play in informing the court of generally accepted program or treatment standards. In the *Pennsylvania* case, for example, a number of experts provided a new definition of education for the court stressing that all persons can learn and that learning involves not just academics but the acquisition of skills that enable individuals to better cope with their enviroment regardless of their environment. This concept was regarded as a key success of the litigation. Implementation of the concept means that for severely mentally retarded children, education might also mean the acquisition of basic self-help skills including feeding and toileting. In the *Wyatt* case, plaintiffs, defendants, and amici agreed to a large number of specific standards for adequate treatment, and experts offered testimony explaining to the court why certain specific standards were necessary to insure adequate treatment. Based upon the experts endorsement the court ordered the recommended standards to be implemented as constitutionally required minimums.

THE TRIAL

CAN THE PARTIES ELECT TO HAVE A TRIAL BY JURY?

Parties have a right to a trial by jury except when they are seeking injunctive relief. Even with the right to a jury, their attorney must demand a jury trial or the judge will automatically decide the case. A jury can only determine questions of fact, such as who was telling the truth, while the judge always determines questions of law such as, what must be proved to indicate that someone's right to an education has been violated. If there is no jury, the judge determines questions of both law and fact.

WHAT ARE THE ACTUAL STEPS OF THE TRIAL?

Usually, the plaintiff's attorney will present his *evidence* first. The defendant's attorney can cross-examine the plaintiff's witness. Either side may object to any evidence or testimony if they do not believe it should be admitted. The judge will rule on whether the evidence in question is admissible based upon such factors as its relevance, trustworthiness, prejudice and prior appellate decisions on the issue.

When the plaintiff's attorney has presented all of his evidence, he will rest his case. At that time, the defendant's attorney may make a *motion for a directed verdict* or *a motion for summary judgment* which means that he is asking the court to decide that as a matter of law the plaintiff has failed to prove the facts necessary to establish the case, or that based upon the facts established by the plaintiffs, the defendants must win as a matter of law. The court can then grant the motion ending the trial or continue with the defendant's attorney presenting his evidence followed by the plaintiff's attorney cross-examination and the raising of appropriate objections. When the defense rests, either side may move for a directed verdict. If the judge denies the motion, he may then weigh the evidence of each side and immediately decide the case and make a decision or he may delay his decision until after he has had time to study the issues involved. He may ask each side for *trial briefs* stating each side's position on disputed points of law which are areas where courts have disagreed or have not actually decided on a particular point under these circumstances.

Usually, attorneys for each side will present oral arguments emphasizing why the case should be decided in their favor and explaining what relief they are seeking.

IS THAT THE END OF THE TRIAL?

After the verdict is reached, the "winner" will make a motion for a judgment on the verdict and the "loser" will make a motion for a judgment notwithstanding the verdict such as asking the court to decide for the losing side even though they lost the jury verdict. The judge will issue a judgment which sets out the relief to be granted to the winning side. For the loser, there are still other steps, filing a *motion for a new trial,* and, if this is refused, a *motion for appeal.*

WHAT CONDITIONS CREATE THE NECESSITY FOR AN APPEAL?

The losing side can appeal if they believe the decision was decided incorrectly as a matter of law or that the judge made procedural errors during the trial, such as improperly admitting or excluding evidence. The losing party must have raised objections to such errors at the time they occurred or an appeal will not be permitted.

IS AN APPEAL LIKE A NEW TRIAL?

An appeal is not another trial since there will not be another chance to call additional witnesses or to present additional evidence unless some new material and relevant evidence which could not have been uncovered earlier has come to light since the conclusion of the trial. Pursuit to an appeals court asks the court to review the record of the trial court proceedings, which consists of all the written materials from the trial. In addition, both sides will submit a brief which sets out the errors allegedly made by the trial judge with appropriate supporting legal arguments and cases. Counsel for each side will usually also present *oral arguments* before the judges, summarizing their cases as well as answering questions.

The appeals court judges seek to determine whether the trial judge properly stated and applied the law in his rulings and/or charge to the jury. They may also review fact determinations by the jury. If the appeals judges find an error, they will reverse the trial judge and either grant some or all of the relief being sought, or remand (send back) the case to the trial court for a retrial on some or all of the issues. A judgment will not be set aside unless the error affected substantial or material rights of the parties. If the appeals judges support the ruling of the trial court, they will affirm the trial court's decision.

The loser of the first appeal may be able to appeal again to the next highest court. In states where there are two appeals levels, the highest court may have great discretion in deciding which cases it will review and may not have to review every case, except those involving constitutional questions. After the highest state court, or the appropriate U.S. Court of Appeals if it is a federal case, it may be possible to obtain review by the U.S. Supreme Court; but again, the Supreme Court need only accept a limited number of cases *by appeal*. Most of the cases which it hears occur through the granting of a *writ of certiorari* which is a request that the Court uses its discretionary powers to hear the case. It may also hear a case *by certification* if a court of appeals requests instructions on a question of law. Even though a party believes he has a case that was decided incorrectly, the Supreme Court is not required to review it and will usually only choose to hear those cases involving issues they deem important. Four of the nine Justices must decide to hear a *cert (writ of certiorari)* case before it is brought before the entire court. The entire process is reviewed in Chart III.

WHAT IS A PRECEDENT?

A *precedent* is a rule to guide or support other judges in deciding future cases seeking similar or analogous decisions. For example, in the *Mills* case,

CHART III
LITIGATION PROCESS

Choose Proper Court	State or Federal Court Jurisdiction Procedures, Competence, Fairness	**Settlement? Negotiation?**
Preparation	Complaint and Pleadings Answers and Defenses Replies, Amendments, Motions Discovery Preliminary Hearing Pre-Trial Conference and Order	**Settlement? Negotiation?**
Trial	Judge or Jury Plaintiff Presents Evidence; Defendant Cross-Examines Defendants Presents Evidence; Plaintiff Cross-Examines Oral Arguments Instruction to the Jury Verdict-Motion-Judgment	**Settlement? Negotiation?**
Appeals	Motions Briefs Oral Arguments Judgement	**Settlement? Negotiation?**

the judge based his decision that handicapped children have a constitutional right to public education on due process and equal protection of the laws. In support of his decision, the judge cited several famous educational decisions as *precedent*, including *Brown v. Board of Education*, the 1954 Supreme Court decision outlawing segregated schools and the *Hobson v. Hansen 269 F.Supp. 401 (D.C.D.C. 1967)* decision by Judge J. Skelly Wright outlawing the so-called "tracking system" in the District of Columbia.

As a precedent, a decision will have most value in the jurisdiction where it is handed down. For example, courts in Alabama are more likely to follow prior Alabama decisions than prior New York decisions on the same issue. Courts in one area of the country are more likely to follow decisions by other courts in their region so some decisions are said to have regional impact.

Decisions in certain state courts, certain federal district courts or certain appeals courts are considered more influential than others and may be considered more heavily by some judges because of the recognized competence or reputations of the judges who made the decisions.

A decision from a circuit court of appeals is of even greater value than one from a district court. A decision by the U.S. Supreme Court establishes the greatest possible precedent because the decisions of the Supreme Court are binding across the country and usually all state courts when hearing cases involving federal law conform their decisions to Supreme Court rulings.

A word of caution should be interjected, however, because in interpreting and applying Supreme Court decisions to different facts, lower courts may still resolve similar cases differently, until other Supreme Court rulings occur that clarify or strengthen the position. This points out that there is really little absolute or "apolitical" law that remains immutable as time passes, as public policies change and interests of society shift.

WHAT DETERMINES MERIT OR WEIGHT OF A DECISION?

The importance of a decision depends on the court that issued it, whether the decision is published and available, whether it is being appealed and the quality of the reasoning behind the decision.

A decision can be more or less persuasive depending on the level of the court and its jurisdiction. A decision from a state trial court or a federal district court has less weight or influence than a decision from a state or federal appeals court or a state supreme court.

A decision may also have *spillover value* and contribute to change. For example, if the *Wyatt* case had been a private action, the decision would have in theory only directly affected Ricky Wyatt and the defendants would have been legally bound to change their actions in relation only to him. By this decision, however, the defendants might have been influenced to change their actions toward all of the residents of the institution. If the *Wyatt* case had been a class action which only joined the residents at one hospital in Alabama, the defendants would only have been legally bound to change their actions and to improve conditions at that single facility. However, the defendants and

other persons with state-wide responsibilities who became aware of the court's decision might on the basis of the ruling, decided to improve the situation in all the state institutions, knowing that other residents could bring similar suits which would again involve the defendants in costly and lengthy litigation leading to the same conclusion. It is also likely that spillover affects practices in locales other than the one directly affected by the decision.

LITIGATION EXPENSES

WHAT COSTS ARE INVOLVED IN BRINGING A SUIT?

There are three main costs: *attorneys fees, litigation expenses,* and *court costs.*

Different attorneys charge different fees,* depending upon the nature of the case, the time expended in the preparation and trial of the case, the attorney's amount of experience and reputation, and the ability of a client to pay. Attorneys fees may also vary considerably from one geographic region to another, so it is not possible to cite exact dollar figures. Generally however, attorneys fees are expensive. Average hourly costs generally range from $20 to $100 and $50 an hour is not uncommon. If plaintiffs win the case, there is a chance that they will be awarded court costs, but it is more difficult to recover attorneys fees, except where a statute provides for their recovery or where the court uses its discretion to award the fees.

Recovering attorneys fees is an area of expanding law, however, particularly in cases which are won by public interest groups and which demonstrate benefits that extend to members of society beyond the plaintiffs. For example, in the *Wyatt* case, the Court found that by successfully prosecuting the suit, plaintiffs benefitted not only the present residents of the two state hospitals and school for the mentally retarded, but all others who might in the future be confined to those institutions. As the Court stated, "veritably, it is no overstatement to assert that all of Alabama's citizens have profited and will continue to profit from this litigation. So prevalent are mental disorders in our society that no family is immune from their perilous incursion. Consequently, the availability of institutions capable of dealing successfully with such disorders is essential, and, of course, in the best interest of all Alabamians." The Court ordered that the defendant Alabama Mental Health Board pay the expenses and plaintiff's attorneys fees.

In attempting to determine what was a reasonable fee under the circumstances, the Court referred to the Criminal Justice Act which provides compensation to attorneys appointed to represent indigent defendants. The Act's legislative history makes it clear that although the amount provided, $20 per out-of-court hour and $30 per in-court hour, is below normal levels of compensation in legal practice, it nevertheless is considered a reasonable basis upon which lawyers can carry out their professional responsibility without either personal profiteering or undue financial sacrifice. The Court applied the $20 and $30 fee schedule in *Wyatt*, and reasoned that the attorneys embarked upon the case with knowledge that their named clients were unable to pay them and were motivated not by desire for profit, but public spirit and a sense of duty. A total of $36,754 was awarded by the Court to cover attorneys' fees and expenses.

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*A manual explaining attorney's fees is available from the Lawyer's Committee for Civil Right Under Law, 733 15th St. NW Suite 520, Washington, D. C. 20005

It may also be possible to involve a public interest law firm in the types of cases described in this book, or the Public Defender Service or attorneys from a local Legal Aid Office. Profit-making "public interest" firms usually charge very low fees. In addition many regular law firms also devote a portion of their time to *pro bono* (free) work, work in the public interest without compensation.

While most attorneys' fees are computed on an hourly basis as indicated above, some attorneys will charge a flat fee, a lump sum for conducting that suit through one or more levels. Those bringing a tort action can frequently acquire an attorney who will handle the suit on a contingency fee basis. If the case is won the attorney will receive as his fee a percentage of the amount awarded by the court. It may be one-third or one-half of the award. If the case is lost, he will receive nothing. Understandably, attorneys will probably not become involved on a contingency basis with cases which they feel are hopeless.

WHAT DO LITIGATION EXPENSES INCLUDE?

Litigation expenses include payment for such items as necessary discovery devices such as the costs of taking depositions and giving physical examinations, travel expenses for lawyers and expert witnesses, filing fees, and duplicating expenses.

WHAT DO COURT COSTS INCLUDE?

Court costs are fees and charges required by laws of the various jurisdictions for the time of the courts and some of the officers of the court. Court costs are normally awarded as a matter of course to the prevailing (winning) party and paid by the losers.

Litigation should not be pursued on the assumption that there will be no financial responsibility in bringing the suit. Neither, however, should the possibility of litigation be rejected because it appears financially out of the question. If an individual or organization becomes a party in a suit involving exceptional children or handicapped adults, the resource groups listed in the appendix could be of assistance.

HOW LONG DOES IT TAKE TO LITIGATE A CASE IN THIS AREA?

This depends on the type of case being brought, the schedule and work habits of the court and on whether any appeals will be involved. For example, attorneys for the plaintiff were involved in the *Wyatt* case for 18 months before a decision was handed down in March of 1972 and the appeals process is still underway. Attorneys involved with the *Mills* case engaged in eight months of preliminary work prior to filing of the suit and 11 months of effort from the time of filing to decision. There is no specific answer to this question.

AFTER LITIGATION

WHEN HAS VICTORY BEEN ACHIEVED?

Declaration by a court that handicapped persons have a right to education, treatment or proper classification merely signals that the hard work of implementation still lies ahead. It may also conclude only the first round of litigation since if required implementation does not occur, the parties could once again be in court.

WHAT ARE SOME OF THE FACTORS COMPLICATING IMPLEMENTATION?

Complicating the implementation of a court order is the basic fact that in the types of litigation discussed here, victories for handicapped persons, particularly if class actions often require action on the part of the public agencies and employees who have been publicly defeated. Although stressed in the introduction that litigation is not necessarily a personal attack, some lawyers say that there is no such thing as a friendly lawsuit.

Establishment by the court that certain individual rights are protected by the constitution or that specific actions must be undertaken to observe those rights does not in any way guarantee that the needed corrective action will occur. To bring about action requires at a minimum changes in established human behavior patterns at possibly a number of governmental levels and agencies. The consent agreement achieved in *PARC* involved the education agencies at the state, intermediate, and local levels as well as the state agency administering state institutions and other non-school programs for the mentally retarded. Thus, to implement the order, behavior had to be changed in state and local policy making bodies such as boards of education, administrators including school and institution superintendents as well as individual building principals and finally the whole range of staff from dieticians to teachers, to therapists to custodians to bus drivers.

It is likely that implementation of victorious class actions of the nature described here will require additional resources. In *Wyatt*, the court required the immediate hiring of 300 ward attendants to insure the physical well being of institutionalized persons. Data collected in one intermediate district in Pennsylvania since the implementation of the *PARC* decree indicated that costs for the total program of special education have increased 40 percent.*

Another problem concerning implementation is that after the conclusion of the litigation, very few of the people and often only those in the highest levels of responsibility become familiar with the decision and its meaning. The majority of persons involved in implementation learn about the decision by rumor or are provided with the "pieces" of the order that are particularly relevant to their job responsibilities. Equally significant is that in some situations where government is required to alter its practices, officials at the

*Dr. Richard Sherr, Oral Presentation, Dover, Delaware, March 23, 1973

highest levels never publicly announce or at least acknowledge past injustices or approval of the decision or at best, the commitment of his office and administration to implementation. The latter step was taken by Governor Shapp of Pennsylvania which put the entire state on notice that implementation of the PARC consent agreement was to occur.

WHAT ARE SOME OF THE REQUIREMENTS TO ACHIEVE IMPLEMENTATION?

Often two extremes of response occur in the aftermath of a decision by the victorious side. One response is based on the misperception that total victory has been achieved, the job is concluded and that the time has come for glorious rejoicing. The other extreme reflects a more cautious view and focuses on vindictively monitoring every movement of the defeated side for the purpose of reporting to the court, the public and the victorious constituency. While monitoring is clearly required, it must not be done with malice, nor must the victorious stand aside harping and offer no assistance to those now involved in making changes. Clearly positive change requires the wedding of both sides in the litigation.

The discussion of the problems above points the way for the identification of solutions. First and foremost however, is that to achieve effective implementation, the public, and particularly that portion of the public that makes or has impact on the making of policy decisions must be educated as to the issues leading to the litigation, the results, and the requirements to bring about change. If for example handicapped children, who previously were excluded from school, are to profit from their newly won right to enroll in a school where they may be non-handicapped children, the quality of that experience for that child may well depend on the information related to and the attitudes of the parents of the non-handicapped children.

Public education must involve the use of mass media, prominently displayed posters and any other communication devices that will effectively deliver the message. In *Mills*, the court required the insertion of quarterly advertisements in Washington's three major daily newspapers announcing that all District of Columbia children have a right to a free-publicly supported education.

Change from past behavior to new behavior requires the infusion of new ideas and of course extensive work. Many of the new ideas can result from a merging of the resources of the previous adversaries. Persons outside government can effectively work in an advisory role in committees with agency representatives. Often the non-governmental resource people are involved with private agencies such as parent groups including Association for Children with Learning Disabilities, and the National Association for Retarded Children that can be of great assistance in disseminating information as well as other tasks.

Involvement by the winner of the suit with the loser also builds the base for effective monitoring of the steps being taken for implementation. In addition, monitoring in this fashion will make clear to those outside the points of responsibility the needs that exist within to facilitate the

implementation process and will allow for the development of exterior strategies and activities to meet those needs.

It must be recognized that the implementation process will not always occur in smooth fashion and that old issues and differences of opinion will occur. This is the reality. The resolve of these disputes should if possible, occur without the intervention of the court. This function can be effectively discharged by masters, if appointed by the court. In many judicial orders, requirements for reporting to the court on progress made may serve as a means of resolving these issues.

CAN THE PARTY WIN THE CASE, BUT LOSE THE WAR?

The point cannot be made strongly enough that a judicial decision may not be worth the paper on which it is written, if it is not implemented. The delays in integrating schools for some 20 years after the *Brown* v. *Board of Education* decision in 1954 serves as an example of the difficulties in implementing a court's decree even when it is issued by the highest court in the land.

In *Rouse* v. *Cameron* a 1966 case which was hailed as a landmark in the right to treatment area provides another example of the unfortunate lack of implementation phenomenon. Seven years after *Rouse*, there has been judicial recognition of the right to treatment in only a few jurisdictions and little implementation of the right where it has been recognized. The needed changes of behavior and dialogue between mental health professionals and lawyers, envisioned by the *Rouse* court, has yet to take place.

WHAT IS THE RELATIONSHIP BETWEEN LITIGATION AND OTHER AVENUES FOR LEGAL CHANGE?

Ultimately, the remedy of injustice from the handicapped will occur because increased public awareness and concern will lead to different attitudes accompanied by alterations in fiscal priorities required to establish needed programs and services. To this end, litigation because of its appeal to the media has and can create an atmosphere calling for reform.

The right to education movement for handicapped children that has been occurring for the past few years has produced a climate in which high level government officials have publicly committed their resources to remedy the injustice. Governor Christopher Bond on a January 21, 1973 edition of ABC-TV's Issues and Answers indicated when asked about Missouri's priorities replied that his first is state support for special education. Specifically, he said "Many of our special children in Missouri don't have access to special education services, and I think this is—morally this is wrong, and I think may be the children may even have a constitutional right to this education, so we want to put many more dollars into that."

Another benefit realized from the right to education movement has been in the area of state and federal legislation. On the federal level, a number of bills have been introduced during 92nd and 93rd Congress regarding the education of the handicapped. A few of these (S. 6 and H.R. 70) focus

specifically on providing the states with financial assistance to improve and expand their education programs for handicapped children. Since the beginning of the litigation effort, a vast number* of bills have been introduced and passed in the states. Totally new and comprehensive legislation providing for the education of the handicapped was passed during that time in Massachusetts** and Tennessee† that has as basic policy, that all children were entitled to a free public education.

Other effects have been seen in recent attorney generals rulings. In Delaware, the attorney general issued an opinion on March 26, 1973 that declares on the basis of *PARC* and *Mills*, that statutory limitations on the growth of some special education programs are unconstitutional.

Because the right to treatment movement has not progressed at the same rate, less official evidence is available of change. Yet, it is known that administrative practices have changed and that because of the visibility given this issue, fiscal alterations can be expected to some degree in the future that will further improve practices.

Finally, it must be emphasized again that litigation by itself is not a solution to a problem. It can however clarify the problem and establish multiple bases for instituting change. All avenues of the law, legislation, regulations, attorney general's opinions and litigation can and must be brought to bear on altering the present status of the handicapped in the U.S.

The guiding principle must be that in the perspective of a society characterized by a good deal of commotion over numerous causes, only a few "successes" ever really stand out; these are situations in which the plaintiffs and their supporters have never stopped asking, "Now have we won?"

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*899 bills introduced in 1971, U.S. Office of Education Commissioner, oral presentation, Washington, D.C. March, 1972.

**Chapter 718, 1972

†Chapter 839, 1973

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RESOURCE ORGANIZATIONS

The following organizations are some of the groups which have in the past been involved in efforts related to the areas discussed in this document to improve practices on behalf of handicapped children and adults as well as bringing about change in the legal base upon which such services are delivered.

The Council for Exceptional Children, 1411 Jefferson Davis Highway, Suite 900, Arlington, Virginia 22202

National Center for Law and the Handicapped, 1235 No. Eddy Street South Bend, Indiana 46617

Mental Health Law Project, 1751 N Street, N.W., Washington, D.C. 20036

American Association on Mental Deficiency, 5201 Connecticut Avenue, N.W., Washington, D.C. 20015

National Association for Retarded Children, 2709 Avenue E East, Arlington, Texas 76010

National Legal Aid and Defenders Association, 1601 Connecticut Avenue, N.W., Washington, D.C. 20009

American Civil Liberties Union, 84 Fifth Avenue, New York, New York 10011

Harvard University Center for Law and Education, 38 Kirkland Street, Cambridge, Massachusetts 02138

United Cerebral Palsy Associations, Inc., 66 East 34th Street, New York, New York 10016

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